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No. 204

In the
Supreme Court of the United States
OCTOBER TERM, 1970

JAMES EDWARD CRAMPTON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION, AND ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT.

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The American Civil Liberties Union and the Illinois Committee for the Abolition of Capital Punishment, move the Court for leave to appear as *Amici Curiae* in this case and to file a brief in support of the petitioner. Petitioner has consented to the filing of this brief. The respondent declined to consent.

The American Civil Liberties Union, an organization devoted to the preservation of a free and open society, principally through the Bill of Rights and the Fourteenth

Amendment to the Constitution of the United States, has taken the position that capital punishment is inherently a civil liberties issue.

With leave of this Court, the Illinois Division of the American Civil Liberties Union filed an *Amicus Curiae* brief in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). In that brief, and particularly in points III and IV (pp. 19-30), pertaining to the absence of legislative and judicial guidelines, the A.C.L.U. anticipated in some aspects the issues to which the grant of certiorari herein has been limited.

Capital punishment must be examined, not as if it were one among many punishments society chooses to impose upon its offenders, but one awful in contemplation and irrevocable in result. The issues as framed by this Court must be considered in light of the fact that the death penalty is withering away everywhere. The dramatic decline is shown by the fact that from 1968-1970 (to date) there have been no executions in the entire country; in 1967, there were two executions, and in 1966 one. A substantial and growing segment of all Americans, probably a majority, is opposed to the death penalty. Yet almost 500 persons are now under sentence of death. This creates a moral and constitutional dilemma that should be resolved by this Court.

The Illinois Committee to Abolish Capital Punishment joins with the American Civil Liberties Union in this application. This Committee numbers in its membership leading citizens of the State of Illinois, of all religious faiths and professional, social and economic levels. It has been active in its field for several years and is familiar

with the problems involved herein. Counsel for Movants are members of the Committee.

Respectfully submitted,

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Because the attorneys for *Amici* practice in Illinois, this brief will be devoted largely to the Illinois experience and will supplement what is before the court respecting Ohio and California (in the companion case of *McGautha v. California*, No. 203).

Presently about 30 persons are under the death sentence in Illinois. The number has been rising steadily. At the end of 1968, the last year for which full statistics have been published, Illinois had 25 inmates on death row and ranked fifth among the states in the number of capital prisoners.

The Illinois experience has broad relevance to the case at bar because all of those awaiting execution in Illinois have been convicted of murder. Thus the Illinois cases present the mainstream of the problem.* Furthermore, under Illinois law there is both a unitary trial and an absence of statutory and case law standards. Thus each of the questions upon which certiorari has been granted is an Illinois issue. There are, however, subtle differences between Illinois law and Ohio law. Comment on these differences will put the issues at bar in broader perspective.

* For 1968, of 479 individuals then under sentence of death nationally, 405 were sentenced for murder. National Prisoner Statistics—Executions No. 45, Aug. 1969, Table 10, page 22.

ARGUMENT

I.

The single verdict procedure violates the Fifth and Fourteenth Amendments.

The single verdict procedure became part of the law of Illinois by historical accident. The earliest statute on murder, enacted for the Northwest Territory, was the law of September 6, 1788. (Pease, Laws of the Northwest Territory—1788-1800, page 13). It provided tersely:

> "If any person or persons shall with malice aforethought, kill or slay another person, he, she, or they so offending shall be deemed guilty of murder, and upon conviction thereof shall suffer the pains of death."

Under this statute, there was no occasion to separate the issues of guilt or innocence from the issues of mitigation or aggravation, because there was only a single penalty for murder. The definition of the crime of murder varied somewhat over the years, but the sole statutory penalty provided for murder was death. (See the statute enacted for Illinois Territory in 1807, Philbrick, Pope's Digest, 1815, Volume 1, page 91.) It was re-enacted in the first criminal code of the State (Laws 1819, page 213, Section 2). (For later enactments see Revised Code of Laws, 1827, Criminal Code, Sections 22-24 and Rev. Stats., 1845, Chapter 30, Sections 22-24.)

In 1867, for the first time, the mandatory sentence of death for murder was abolished. In its place the jury was authorized to impose a sentence of death, life imprisonment, or a term of not less than 14 years. The humani-

tarian purposes of this statute are apparent from its text (Laws 1867, page 90):

> "That in all cases of felonies, which, by existing laws are punishable with death, it shall be competent for the jury empaneled, to return with their verdict of guilty, and as part of the same, either that the prisoner shall suffer death by hanging, as now provided by law, or that he be imprisoned in the penitentiary for the term of his natural life, or for a term of not less than fourteen years, as they may decide; and no person shall be sentenced to death by any court, unless the jury shall have so found in their verdict upon trial."*

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* The foregoing statute remained essentially unchanged until enactment of the Criminal Code of 1961, Illinois Revised Statutes 1967, Chapter 38, Secs. 1-7 (c) and 9-1.

Sec. 9-1 (b) provides:

> A person convicted of murder shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 14 years. If the accused is found guilty by a jury, a sentence of death shall not be imposed by the court unless the jury's verdict so provides in accordance with Section 1-7(c)(1) of this Code.

Sec. 1-7(c)(1) provides:

> Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, the jury may return a verdict of death. Where such verdict is returned by the jury, the court may sentence the offender to death or to imprisonment. Where such verdict is not returned by the jury, the court shall sentence the offender to imprisonment.

Thus under present law, the jury determines guilt and then may recommend the death penalty. It has no further role to play in sentencing. If the jury recommends death, the judge may impose death or a term of not less than fourteen years. If the jury does not recommend death, the judge may not impose death but only imprisonment.

Illinois law prior to 1961 was similar to Ohio law in

The Illinois Statutes were codified in the mid 1870's. The earlier enactments, together with the 1867 amendment, appeared in the Revised Statutes of 1874, Chapter 38, §142, as follows:

> "Murder-Punishment. §142. Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court. R.S. 1845, P. 155, §24; L. 1867, p. 90, §1."

The 1874 codification preserved the purposes of the 1867 amendment, but the humanitarian history of the amendment was obscured.

In the century which has passed since 1867, our perception of the world and of man has undergone a revolution. The world of 1867, compared to today's, was relatively simple in its awareness of human motivation. It may have been enough to give the jury a choice of punishments. The need for a two step procedure by which first to determine guilt and then punishment doubtless was not perceived. Perhaps imprisonment was viewed as an act of grace; perhaps it was felt that evidence on the guilt-innocence issue provided ample evidence as to punishment.

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*(Continued)
that the jury determined both the death sentence and the term of imprisonment. It differed in that under Illinois law the jury had to make a positive decision to fix the punishment at death, whereas under the Ohio law if the jury finds the defendant guilty and fails to recommend mercy, the death sentence becomes mandatory. (Ohio Revised Code, §2901.01, 248 N.E. 2d at 617) (Of the 30 pending Illinois capital cases, two are subject to the pre-1961 law).

Whatever the reason in 1867, it is apparent today that a new constitutional standard must be applied.

Today, largely because of the Fourteenth Amendment, our vision of the criminal trial is clearer. There is initially a need to determine whether the accused was responsible (in a physical, not a moral sense) for the death of the deceased. Only after this determination has been made adversely to the defendant, is it appropriate, indeed constitutional, to consider his punishment. The death penalty, once routine, is today exceptional. Evidence in mitigation ought constitutionally to relate to the full sweep of the defendant's personality and other relevant circumstances.

Yet how do we try a capital case before a jury? The guilt-innocence question is center-stage. Often the crime itself is horrible. The courtroom rings with detailed descriptions of the terrible scene. Graphic photographs may be in evidence. Pathologists may report in dry but telling terms of the damage to vital organs causing death.

If the defense contends that the accused was not responsible (again in a physical sense) for the death of the deceased his defense will be confined to his alibi or other defense. Throughout the trial it is unlikely that the jury will have learned anything meaningful about the defendant. True, if the defense admits physical responsibility for the death but claims, for example, that the crime was not murder but manslaughter, or that the defendant acted in self-defense, or that he was incapable of forming the requisite intent, or some other similar defense depending upon the defendant's state of mind, the jury may obtain some picture of the defendant as a human being. Absent this circumstance it is almost certain that the jury will retire knowing almost nothing of the defendant relevant to sentencing should they find him guilty. Indeed, if the

defendant exercises his constitutional privilege not to testify, the jury may well never hear him speak a word during the course of the trial.

True, again, the defendant has a theoretical right to introduce evidence in mitigation. To do so where the defense is that he did not commit the crime, would surely undercut that defense so severely that it could scarcely be risked. No cautionary remarks from the Judge would overcome the enormous handicap to the defense. Who would believe a defendant who simultaneously declared his innocence and then asked a jury to show him mercy if it did not believe his assurance of innocence?

Nor is that all. The attorney for the defense is unable to make an effective plea for mercy because it too would undercut the defense and also because there is no, or at any rate, very little evidence in the record for mitigation. Even where there is a "state of mind" defense, *e.g.*, that the defendant reasonably acted in self-defense, it may be inconsistent to argue for mercy while simultaneously contending that there were reasonable grounds to believe, for example, that the deceased was about to make a deadly assault upon the defendant.

But the prosecutor suffers scarcely any limitations. A substantial portion of his case has been devoted to a minute examination of the crime. The murder itself cries out to the jurors. Perhaps he may not be able to introduce evidence solely for the purpose of showing aggravation but in many cases, perhaps most, such evidence will scarcely be needed because the crime itself effectively performs that task for the prosecutor.

Thus the jury retires to consider its verdict. On the question of guilt or innocence its focus is necessarily upon

the crime where it properly belongs, but after reaching its verdict of guilt its focus remains upon the crime in determining punishment rather than shifting to the defendant and to the circumstances where it then belongs.

If these were all of the inequities endured by the defendant they would be heavy enough, but they are not. Even in a state such as Illinois which now permits a judge to accept or reject a jury's recommendation of death the defendant goes before the judge carrying the burden of such a recommendation, made in ignorance of the personality and life history of the defendant. Thus even in Illinois, where there is an opportunity to present evidence in mitigation to a judge, the defendant enters the battle for his life burdened with a constitutionally impermissible handicap. On appeal, the Supreme Court of Illinois has power to modify the sentence. (See Rule 615 (b) (4) of the Rules of the Supreme Court of Illinois, which provide that on appeal the reviewing court may "reduce the punishment imposed by the trial court.") The power to mitigate, first enacted as Section 121-9 of the Code of Criminal Procedure of 1963, has rarely been exercised by the Supreme Court of Illinois in the 7 years that this provision has been part of Illinois law.* (See Point II, pp. 14-20 below.) We cannot explain with certainty the reluctance of the Supreme Court to reduce sentences, but it may, at least in part, be because of the initial impetus to the death sentence provided by an uninformed jury. When the defendant comes before the Governor seeking commutation, having exhausted his judicial remedies, he again carries with him the burden of a jury

* We are aware of only two cases:
Witherspoon (cf. 391 U.S. 510 (1968) and a woman, Mrs. Veronica Crews (42 Ill. 2d 60)

recommendation, now fortified by sentence, and affirmance on appeal. (See further Point II, pp. 14-21 below.)

If the unitary trial had been forced upon us by special exigencies or as a compromise between conflicting values, or for some other rational cause, it would be a serious enough deprivation of constitutional rights. There are no such reasons. In fact, the remedy for this gross evil is plain and has already been adopted in California and in a number of states. We need only confine the trial initially to the guilt-innocence question and ask the jury to rule upon it. If the jury finds the defendant guilty, the prosecution and defense can then introduce evidence in mitigation. It seems clear to us that the sole reason we do not now have such a procedure is because of the historical development outlined above. A practice originating prior to the 14th Amendment ought not to be retained when its evils are manifest, the remedy plain, and the practice contrary to due process.

The only grounds adduced by the court below for refusing to require splitting of the issues are insubstantial. The court below, 248 N.E. 2d at 617, discussed the problem solely in relation to the constitutional protection against self-incrimination. As we have seen, the objection to the unitary trial is not so limited but may force the defendant to gamble his life to achieve his freedom.

Separation of the issues of guilt-innocence and penalty is constitutionally necessary. Where we are concerned not with life or death but simply with money judgments in personal injury litigation, Civil Rule 21 of the United States District Court for the Northern District of Illinois provides that there may be separate trials of the liability and the damage issues. The damage issues may be tried

before the same jury or another jury. What we do in personal injury litigation to achieve more exact justice, surely we must do as a matter of constitutional necessity when human life is at stake.

II.

Imposition of the death penalty in the absolute discretion of the jury, uncontrolled by standards or direction of any kind, violates due process.

The argument here was spelled out most persuasively in the separate opinion of Mr. Justice Tobriner in *In re Anderson*, 73 Cal. Reptr. 21 at 36, 40-59. We add only the following.

The Illinois statutes cited above, which are typical of those in other states, require explicit agreement of jury and court as a condition to imposition of death. Yet no standard is provided by which they can determine whether the death penalty is proper. As the Illinois Supreme Court stated in *People* v. *Bernette*, 30 Ill. 2d 359, 197 N.E. 2d 463 (1964): "The jury . . . was free to select or reject as it saw fit." *Id.* at 370.

Ill. Rev. Stat. ch. 38, sec. 1-7(g) (1967) does provide that the Court may hear evidence in mitigation before deciding if death is proper. Such evidence may concern the "moral character, life, family, occupation, and criminal record of the offender." But nowhere in this statute does a standard appear by which the jury or judge can assess these very vague "mitigating circumstances."

Illinois is not alone in allowing the jury unfettered discretion in deciding whether to impose the death penalty or not. All state legislatures which have not abolished the death penalty have left the complete discretion in

the jury.* There are no explicit standards to guide the jury. As Kalven and Zeisel state: "The discretion which the jury in the United States is asked to exercise is, it should be emphasized, striking: there is neither rule nor standard to guide it. . . ." "The American Jury and the Death Penalty," 33 U. Chi. L. Rev. 769, 770 (1966).

New York has limited capital punishment to murder of a police officer or prison guard, N. Y. Penal Code sec.

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*Ala. Code tit. 14, sec. 318 (1958); Ariz. Rev. Stat. sec. 13-453 (1956); Ark. Stat. Ann. secs. 41-2227, 43-2153 (1947); Cal. Pen. Code sec. 190.1 (1955); Colo. Rev. Stat. ch. 40, art. 2-3 (1965); Conn. Stat. Ann. sec. 53-10 (1965); Dela. Code Ann. tit. 11, sec. 571 (1953); Dist. of Col. Code § 22-2404 (1962); Fla. Stat. secs. 782.04, 919.23 (1951); Ga. Code Ann. sec. 26-1005 (1963); Idaho Code sec. 18-4004 (1947); Ill. Rev. Stat. ch. 38, secs. 9-1, 1-7(c)(1) (1969); Ind. Ann. Stat. secs. 10-3401, 9-1819 (Burns 1956); Kan. Stat. Ann. sec. 21-403 (1964); Ky. Rev. Stat. secs. 435.010 (1948), Code of Practice in Criminal Cases § 258; La. Rev. Stat. tit. 14, sec. 30, tit. 15, sec. 409 Code of Criminal Procedure § 817 (1967); Md. Ann. Stat. Art. 27, sec. 413 (1957); Mass. Laws Ann. c. 265, § 2 (1968); Miss. Code Ann. sec. 2217 (1942); Mo. Stat. Ann. sec. 559.030 (1949); Mont. Rev. Code Ann. sec. 94-2505 (1947); Neb. Rev. Stat. sec. 28-401 (1943); Nev. Rev. Stat. sec. 200.030 (1967); N. H. Rev. Stat. Ann. sec. 585.4 (1969); N. J. Stat. Ann. tit. 2A, ch. 113, sec. 4 (1953); N. M. Stat. Ann. ch. 40A, sec. 29-2 (1953); N. Y. Penal Code sec. 125.30 (1967); N. C. Gen. Stat. sec. 14-17 (1969); N. D. Century Code § 12-27-13 (1960); Ohio Rev. Code tit. 29, sec. 2901.01 (1964); Okla. Stat. Ann. tit. 21, sec. 707 (1951); Pa. Stat. Ann. tit. 18, sec. 4701 (Purdon 1963); S. C. Code of Laws tit. 16, sec. 16-52 (1962); S. D. Compiled Laws § 22-16-13 (1967); Tenn. Code Ann. sec. 39-2405 Sec. 39-2406 (1955); Tex. Pen. Code art. 1257 (1961); Vt. Stat. Ann. Title 13 § 2303 (1965); Wash. Rev. Code Ann. tit. 9, sec. 9.48.030 (1961); Wyo. Stat. Ann. sec. 6-54 (1957); Code of Va. § 18.1-22 (1950).

1045, but even as so limited the jury has complete discretion in deciding whether to impose the death penalty. Some states have classified murder by "degrees." But within the highest degree which is punishable by death the jury has no statutory or judicial standard by which it can guide itself; *e.g.*, Ala. Code tit. 14, secs. 314, 318 (1958); Idaho Code secs. 18-4003, 18-4004 (1947); Ind. Stat. Ann. sec. 10-3401 (1956); Mo. Stat. Ann. sec. 559.030; Pa. Stat. Ann. tit. 18, sec. 4701 (Purdon 1963).

It thus appears that the jury is given no statutory or judicial guides. What type of instructions must be given to the jury to guide them? There are no Illinois cases on this point but it seems well established by other courts that the trial court need only instruct the jury that it has discretion to decide what penalty should be imposed. Failure to so instruct would be reversible error. *Smith* v. *State*, 205 Ark. 1074, 172 S.W. 2d 248 (1943); *State* v. *Wilson*, 151 Iowa 698, 141 N.W. 337 (1913); *State* v. *Christensen*, 166 Kan. 152, 199 P. 2d 475 (1948); *Commonwealth* v. *Madaffer*, 291 Pa. 270, 139 Atl. 875 (1927); *Marshall* v. *State*, 33 Tex. 664 (1871); *Bradshaw* v. *Commonwealth*, 174 Va. 391, 4 S.E. 2d 752 (1939); *State* v. *Chaney*, 117 W.Va. 605, 186 S.E. 607 (1936). But telling the jury of its discretion is to do no more than repeat a statute which is itself standardless. It has in fact been held that merely reading or quoting the statute which grants discretion is sufficient. *Hernandez* v. *State*, 43 Ariz. 424, 32 P. 2d 18 (1934); *Howell* v. *State*, 102 Ohio 411, 131 N.E. 706 (1921).

Assuming that the jury finds the defendant guilty and imposes the death penalty, and assuming that the trial judge concurs, the Supreme Court of Illinois may, as we have noted, reduce the penalty under Rule 615. But this rule too provides no guidelines by which to judge the lower court's decision on the penalty.

The Illinois Supreme Court has taken a very limited view of its power under this provision. Prior to Rule 615 and its statutory predecessor, in *People* v. *Smith*, 14 Ill. 2d 95, 97, 150 N.E. 2d 815 (1958), the Court said that a reviewing court should not upset a sentence unless it *clearly appears* that the penalty constitutes a great departure from the spirit of the law or that the penalty is *manifestly in excess* of the prescription of Sec. 2, Art. II of the Illinois Constitution which requires penalties to be proportioned to the nature of the offense.*

Subsequent to adoption of the statute allowing sentence reduction, the Court in *People* v. *Taylor*, 33 Ill. 2d 417, 211 N.E. 2d 673 (1965), admonished itself to proceed with caution and circumspection in reducing sentences. The trial judge, it observed, has superior opportunity to make a sound determination concerning the punishment to be imposed. In *People* v. *Bonner*, 37 Ill. 2d 553, 229 N.E. 2d 527 (1967), the Court stated that the imposition of sentence was a matter of judicial discretion, and in absence of *manifest abuse* of that discretion it will not be altered by reviewing court. Although these cases were non-capital cases, they demonstrate the reluctance of a

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* *People* v. *Dukes*, 12 Ill. 2d 334, 146 N.E. 2d 14 (1957) was a capital case. The Court said that where the charge is murder, a jury has wide discretion in fixing the punishment. It added that when the jury in the exercise of that discretion inflicts the death penalty, it could not affirm the judgment even though proof of guilt is clear, if prejudicial error occurred in the trial. This seems to give the defendant some protection; but it is protection only from the possibility that the jury may have decided to impose the death penalty because of the prejudicial error. If there were no prejudicial error, the court would defer to the "wide discretion" of the jury and would not change the penalty.

reviewing court in Illinois to reduce the penalty imposed by the trial court even though reviewing courts are given that power by statute. A case in which the Court said it would not reduce the death penalty is *People* v. *Meyers*, 35 Ill. 2d 311, 220 N.E. 2d 297 (1966) *cert. den.* 87 S. Ct. 752, 385 U.S. 1019, 17 L. Ed. 2d 557. The Court characterized the crime as "brutal" and "atrocious".

Every murder is "brutal and atrocious." Our concern should be not with the crime, but with the criminal. Lacking standards to turn to, the Court looked to the deed, rather than to the doer. The case demonstrates the evil of a path unilluminated by statutory guides.

The Ohio statute makes no attempt to spell out the standards for imposition of the ultimate penalty. The trial judge instructed the jury only that the punishment for first degree murder was death, unless the jury recommended mercy. (A70) Thus the jury was not told that they might reject the insanity defense and yet find sufficient mental unbalance to spare the life of petitioner. Presumably any rational set of standards would include as one element, whether the crime was induced wholly or partly by an abnormal mental condition. In the case at bar, had the jury been informed that it could consider petitioner's mental state, it might well have spared his life. Here was a man with a lengthy history of anti-social conduct. In November, 1966, he signed himself into a private sanitarium because of excessive use of amphetamines and barbiturates, irritability, agitation and depression (A10-11) and threatening his wife's life. After a two-day stay he was committed to a state hospital. He was immediately transferred to a state hospital. On November 28, 1966, a physician at the state hospital declared

"Dangers and Warnings: Under stress, patient could be dangerous to his wife." (A20) Yet in less than a month petitioner was sent home on a twelve-day Christmas leave! (A30) Apparently he overstayed this leave and, while home, shot his wife. Why was petitioner sent home to his wife on this record? Why was he permitted to overstay the twelve-day leave? The record is silent. Had the jury been told it could consider petitioner's mental condition, it might well have spared him.

The absence of standards continues to affect the defendant even when he seeks executive clemency. There, too, clemency may be granted or withheld without statutory or constitutional guide.

Article 5, sec. 13 of the Constitution of Illinois provides:

> "The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor."

Several Illinois cases have considered the Governor's power of commutation. In *People* v. *Jenkins*, 325 Ill. 372, 156 N.E. 290 (1927), the court held, "[t]he only restriction which the Legislature may impose on the Governor's power refers to the regulations relative to the manner of applying for reprieves, commutations, and pardons, and the act on that subject does not purport to and does not, restrict the Governor's authority except to that extent." 325 Ill. at 375, 156 N.E. at 291.

The exclusive discretion of the Governor in matters of commutation, without judicial review or legislative control, is practically a universal rule. With only one

exception,* those courts which have been presented with the issue have held that the actions of the clemency authority are not within the purview of due process, and are not subject to challenge in the courts. *Executive Clemency in Capital Cases,* 39 N.Y.U. Law R. 136, 178 (1964). The Supreme Court of Oregon, in *Eacret* v. *Holmes,* 215 Ore. 121, 333 P. 2d 741, 744 (1958), held:

> "Where the constitution thus confers unlimited power on the Governor to grant reprieves, commutations and pardons, his discretion cannot be controlled by judicial decision. The courts have no authority to inquire into the reasons or motives which actuate the Governor in exercising the power, nor can they decline to give effect to a pardon for an abuse of power."

As authorities for this general proposition, the Oregon court cited: *In re Opinion of Justices,* 120 Mass. 600 (1876); *State* v. *Harrison,* 122 S.C. 523, 115 S.E. 746 (1923); *Martin* v. *State,* 21 Tex. App. 1, 17 S.W. 430 (1886); *People ex rel. Page* v. *Brophy,* 248 App. Div. 309, 289 N.Y.S. 362 (1936); *Ex parte Grossman,* 267 U.S. 87 (1924); *Jamison* v. *Flanner,* 116 Kan. 624, 228 P. 82

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* In *McGee* v. *Arizona State Board of Pardons and Paroles,* 92 Ariz., 317, 376 P. 2d 779 (1962), the Arizona Supreme Court held that a condemned defendant had a right to, and compelled the board to grant, a full due process hearing despite the absence of any constitutional, statutory, or regulatory provision for a hearing. Under the court's construction, the defendant would have to be provided with notice, an opportunity to be heard, an opportunity to present witnesses, and an opportunity to present evidence mitigating circumstances. The court held due process required this result, but nowhere specified whether the federal Constitution or the state constitution was the source of this right.

(1924); *Montgomery* v. *Cleveland*, 134 Miss. 132, 98 So. 111 (1923); 16 C.J.S. Const. Law sec. 157, p. 830.

Although the author of *Executive Clemency in Capital Cases*, 39 N. Y. U. Law Rev. 136, 159-177 (1964), found that clemency authorities sometimes referred to such "standards" as the nature of the crime, fairness of the trial, mitigating circumstances, doubt as to guilt, mental and physical condition of defendant, recommendations of prosecutor and trial judge, and political pressure and publicity, it is plain that these "standards" still cannot be reviewed by a court or be imposed by the legislature.

The totally unfettered discretion given to the Governor, although tending to eliminate some of the harshness of capital punishment, has thus resulted in the creation of a system with no standards.

Amici do not argue that the Governor should be limited in exercising his power of communication. Since he is the last resort open to one sentenced to death, he should have the widest possible discretion in making such a decision. We call attention to this point to emphasize that a man may go to his death and yet at no place in the elaborate judicial and executive machinery is there a legislative or case law standard set for judging who shall live and who shall die. Such situation is repugnant to due process.

CONCLUSION

What this court said in *Witherspoon* v. *Illinois* respecting a "hanging jury" applies with equal force to the issues of dividing the guilt-innocence and penalty determinations, and the issue of lack of legislative and case law standards:

> "The State . . . has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law." 391 U.S. at 510, 521.

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No. 204

Vide No. 203 for (2) related briefs

No. 204

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